IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 9TH AUGUST 2007 / 18TH SRAVANA 1929

Crl.MC.No. 2541 of 2007()

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CRA.44/2007 of SESSIONS COURT, ERNAKULAM
CC.1722/2002 of ADDL.CHIEF JUDICIAL MAGISTRATE, ERNAKULAM
(CMP.1477/2005)

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PETITIONER:

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MOIDEEN SHAH,
S/O. MARAKKAR SHAH,
SHAH INTERNATIONAL, NORTH SQUARE,
PARAMARA ROAD, ERNAKULAM.

BY ADV. SRI.JOSHI N.THOMAS

RESPONDENTS:

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DR. JOSEPH MATHEW,
PALLITHANAM, RESIDING AT
SCARED HEART HOSPITAL QUARTERS,
GREEN GARDENS, CHERTHALAI, PO.,
ALAPPUZHA DISTRICT.

BY

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 09/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**R. BASANT, J.**

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**Crl.M.C. No. 2541 OF 2007**

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Dated this the 9th day of August, 2007

**ORDER**

The petitioner was the accused in a prosecution under Sec.138 of the Negotiable Instruments Act. He allegedly owed amounts to a person – I shall refer to him as `the principal'. To discharge that liability to the principal, the petitioner allegedly issued a cheque to the respondent herein – the Power-of-Attorney holder of the principal. The Attorney, in his own name, initiated proceedings under Sec.138 of the N.I. Act as he was the payee as per the cheque. He explained the issue of the cheque in his name by contending that he was the attorney of the principal and in proof of that produced the instrument of Power-of-Attorney. That instrument is attested by a Notary Public at Calcutta. That instrument of the Power-of-Attorney and the Notarial certificate are produced before me as Annexure-II. In the course of examination, the attorney

asserted that he had never gone to Calcutta to obtain the instrument of Power-of-Attorney. The petitioner contended before the trial court, the appellate court and the revisional court that he had not committed the offence under Sc.138 of the N.I. Act. That contention was not accepted by the trial court, the appellate court and the revisional court. The petitioner has now been found guilty, convicted and sentenced. The verdict of guilty, conviction and sentence have now become final. The Supreme Court has also not entertained the Special Leave Petition, it is submitted. While the revision petition was pending, the petitioner filed an application before the learned Magistrate to initiate proceedings under Sec.340 of the Cr.P.C. against the respondent/complainant. It was alleged that a false statement has been made by the complainant on oath. He had asserted that he had not gone to Calcutta to execute the deed of Power-of-Attorney. But deed of Power-of-Attorney shows that a signature of the attorney bearing the date 5/1/02 is there in the document. It was further seen that the Notary had attested the document on 5/1/02 at Calcutta. The petitioner relied on the presumption available and contended that the respondent must

have been present at Calcutta on 5/1/02 and his assertion contra on oath before the learned Magistrate is false. Consequently, it was contended that proceedings for perjury must be initiated by the court. The application was opposed. The learned Magistrate did not accept the said contention. An appeal was preferred. The learned Sessions Judge has dismissed the said appeal also now. In view of Sec.341(2) of the Cr.P.C. no revision lies and that explains why the petitioner has come to this Court with this application under Sec.482 of the Cr.P.C.

2. The learned counsel for the petitioner submits that both the courts grossly erred in dismissing of the application and appeal under Secs.340 and 341 of the Cr.P.C. It must have been held by the learned Magistrate and the learned Sessions Judge that it is expedient in the interest of justice to proceed against the respondent for having committed perjury. Both courts having not done so, failure of justice has resulted and this Court may invoke the powers under Sec.482 of the Cr.P.C. to interfere with the concurrent findings of both courts rendered in proceedings under Secs.340 and 341 of the Cr.P.C.

3. I must first of all remind myself that sanction for

perjury can only be the medicine of law and not its diet. Every incorrect statement or mis-statement made by a party in the course of the judicial proceedings, however, objectionable, cannot and shall not persuade the courts to invoke the powers under Sec.340 of the Cr.P.C. The section is very carefully worded and the nature of satisfaction to be entertained by the court is crucial. To borrow the words of Sec.340 of the Cr.P.C. the court must be "of opinion that it is expedient in the interest of justice that an inquiry should be conducted into the offence" allegedly committed by the alleged offender. An offence must have been committed. The court must be satisfied that it is expedient in the interests of justice that an enquiry should be made under Sec.340 of the Cr.P.C.

4. I now come to the specific facts. I find that the learned Sessions Judge adverted to this aspect. A deed of Power-of-Attorney must be properly executed before a Notary. The Notary in this case has attested the said Power-of-Attorney. What does the Notary attest? Obviously, under law, the Notary attests only the signature of the principal/executant and the witnesses. He is the one who executes the document. Under

law, Notary must attest the execution by the executant/principal. In such document at times to avoid any dispute about the signature of the attorney, the signature of the attorney is also given and the executant vouches or certifies the signature of the attorney. This cannot at all mean that the attorney is also an executant in the instrument of Power-of-Attorney as to require notarisation by the Notary of the signature of the Attorney. In the instant case, the executant is the principal. He has executed the document. That is the instrument of Power-of-Attorney. In such instrument of Power-of-Attorney, there is a signature of the attorney also. This cannot at all mean that the attorney's signature has been attested by the Notary. The whole case is built by the petitioner on the assumption that the attorney must also have signed the instrument of Power-of-Attorney along with the principal in the presence of the Notary. That assumption is certainly not justified by law.

5. The learned counsel for the petitioner alertly points out that the signature of the attorney in the instrument of Power-of-Attorney also bears the date `5/1/02' which is the date on which the Notary had attested the deed of Power-of-Attorney. Relying

on the identical date affixed by the Notary as also the attorney in the said Deed of Power-of-Attorney (i.e., 5/1/02) the learned counsel contends that the attorney must also necessarily have affixed his signature in the deed of Power-of-Attorney on 5/1/02 itself. Such execution must have been at Calcutta. Therefore, his statement that he had not gone to Calcutta is incorrect and false, contends the learned counsel for the petitioner.

6. I am unable to accept this contention. Every incorrect statement cannot be equated to a false statement. It is possible for the two situations to co-exist. Signature of the attorney is available in the deed of Power-of-Attorney. The deed was signed before the Notary by the executant/principal on 5/1/02. The signature of the attorney could have been affixed before or after the execution of the document by the principal. Merely because the signature has been affixed by the attorney in the deed of Power-of-Attorney earlier or subsequently showing the date as `5/1/02', it would be puerile to jump to a conclusion that the attorney must also have proceeded to Calcutta and must have been available before the Notary when the principal executed the document and the Notary attested the same.

7. The statement is on a most insignificant and non-vital aspect. The cheque is issued in the name of the Attorney. Whether the liability was personal between the principal and the accused or between the attorney and the accused, as drawer the accused is liable under Sec.138 of the N.I. Act. The alleged mis-statement is thus on an absolutely non-vital aspect having no crucial impact on the liability under Sec.138 of the N.I. Act which was the subject matter of the proceedings.

8. Yes, some doubts are aroused in the mind of the court because of the identical date on which the signature of the attorney appears and the date of the execution by the principal and the attestation by the Notary. But I am certainly of opinion that that cannot aggravate the statement of the respondent – attorney on oath before court to the status of a false statement; nor can I agree that such a statement is one which in the interests of justice can be held to be expedient to initiate proceedings under Sec.340 of the Cr.P.C.

9. The learned counsel for the petitioner submits that if this Court does not take any action, the right of the petitioner to complain about the impropriety/culpability is lost and he will

have no other forum where such a grievance can be raised by him. That may be true. The law zealously insist that a party should not be put to any unnecessary and undeserved vexation or subjected to any vexatious proceedings for his acts in court unless the court authorises further proceedings against him under Sec.340 of the Cr.P.C. I have no hesitation to come to a conclusion that no court can be of opinion in the given circumstances that it is expedient in the interest of justice that any further proceedings must be taken under Sec.340 of the Cr.P.C. for the alleged indiscretion committed by the respondent – attorney in respect to the statement made on oath by him.

10. I am satisfied, in these circumstances, that this Crl.M.C. cannot succeed and deserves to be dismissed. I do so.

Sd/-

**(R. BASANT, JUDGE)**

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P.S. to Judge